STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2005
v	No. 249182 Wayne Circuit Court
MARCELL CORNELL EDWARDS, Defendant-Appellant.	LC No. 02-015057-01

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, possession of a firearm by a convicted felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirty to fifty years in prison for the second-degree murder conviction, thirty-eight months to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred in denying his motion to suppress custodial statements made to the police. We disagree.

This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Beuschlein,* 245 Mich App 744, 748; 630 NW2d 921 (2001). Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker*[1] hearing unless those findings are clearly erroneous. *People v Daoud,* 462 Mich 621, 629; 614 NW2d 152 (2000). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court has made a mistake. *People v Manning,* 243 Mich App 615, 620; 624 NW2d 746 (2000).

A defendant who is in custody or deprived of freedom by the authorities in any significant way and is subjected to interrogation must be advised of his constitutional rights. *Daoud, supra,* 462 Mich 633. A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waives

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

his rights. *Id.* A suspect in police custody must be informed specifically of his right to counsel and interrogation must cease if the defendant invokes that right to counsel. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). Furthermore, if after waiver, a defendant invokes his right to counsel during custodial interrogation, questioning must stop until the defendant has counsel present or unless the defendant initiates further communication with the police. *Edwards v Arizona*, 451 US 477, 487; 101 S Ct 1880; 68 L Ed 2d 378 (1981). On the other hand, if an accused validly waives his Fifth Amendment rights, the police may continue to question him until and unless he clearly invokes his rights. An ambiguous or equivocal reference regarding counsel does not require that police cease questioning or clarify whether the accused wants counsel. *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception and must be the product of an essentially free and unconstrained choice by its maker. *Id.* The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Factual findings are sufficient as long as it appears that the trial court was aware of the issues in the case and correctly applied the law. A trial court's findings of fact should be brief, definite, and pertinent, and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts. *People v Wardlow*, 190 Mich App 318, 320-321; 475 NW2d 387 (1991). A court's failure to find the facts does not require remand where it is manifest that the court was aware of the factual issue, that it resolved the issue, and that further explication would not facilitate appellate review. *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992).

The trial court was aware of the issues in the instant cause and correctly applied the law to resolve those issues. The trial court heard testimony at the motion hearing from two Detroit police officers, as well as testimony from defendant and his mother. The first officer's interrogation occurred just over an hour after defendant's arrest on November 15, 2002. He presented defendant with a constitutional rights form and asked defendant to read paragraphs one through four to himself. He also asked defendant to read paragraph five of the form aloud. Defendant initialed and dated each of the paragraphs on the rights form. Defendant also told the officer that he received his GED in 1998. Defendant also initialed a section on the form stating that he had not been threatened or promised anything and that he desired to make a statement. Defendant did not at any time request an attorney during his contact with the officer.

The second officer's interrogation occurred on November 17, 2002. Before beginning the interrogation, the officer provided defendant something to eat. Before the interrogation, the officer also presented defendant with a constitutional rights form and asked him to read each line out loud. Defendant did not have any difficulty reading each of the lines aloud. He also affixed his initials next to each one of those rights. The officer took a three-page written statement from defendant, which he typed out on a computer as the interrogation progressed. In the statement, defendant admitted that he killed the decedent, but stated that he thought he would be killed if he did not do so. The entire statement was read into the record. Both officers testified that defendant never requested an attorney when they interrogated him on separate dates. Defendant testified that he requested counsel on both of the dates he was interrogated. Defendant's mother spoke with the officer who interrogated defendant on the latter date and asked if the officer had

been in contact with defendant's attorney. She stated that the officer told her defendant did not need an attorney and was being questioned as a witness only. The officer denied making the comment. The trial court in the instant case noted in its findings of fact at the hearing that defendant's confession was voluntary and that defendant "never requested an attorney."

The trial court used the correct standard to evaluate the voluntariness of the statement. The trial court found that defendant read and understood his rights on November 15, 2002, and November 17, 2002. The trial court found that defendant had received his GED in 1998 and that he was able to articulate "very well" the waiver of his rights. The trial court found that defendant did not appear to be on drugs, police used no force or threats, and defendant never requested an attorney. The trial court also found that defendant's own testimony established that he had previous experience with the police. The trial court found defendant's detention was not lengthy, nor was defendant physically abused or threatened with abuse. The trial court found that defendant was advised twice of his constitutional rights and that he fully understood those rights.

It is also clear from the record that the trial court recognized the Fifth Amendment issue involved. After hearing all the testimony presented at the *Walker* hearing, and weighing the credibility of all the witnesses involved, the trial court made a finding that defendant "never requested an attorney." This Court gives ample deference to the trial court's findings of fact, recognizing its superior position in viewing the evidence. *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991). Therefore, the trial court did not err in denying defendant's motion to suppress his custodial statements made to police.

Defendant's second issue on appeal is that the trial court erred in giving a jury instruction on second-degree murder. We disagree.

Errors in jury instructions are questions of law that are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Heikkinien*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

Second-degree murder is a necessarily lesser-included offense of first-degree murder. *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002). A necessarily lesser-included offense is an offense whose elements are completely subsumed in the greater offense. An offense is a necessarily included lesser offense when the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser offense. *Id.* at 356-358. In other words, the necessarily included lesser offense must be committed as part of the greater offense, so that it would be impossible to commit the greater without first committing the lesser. *People v Bearss*, 463 Mich 623, 627, 628; 625 NW2d 10 (2002). If a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater. *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003). In a first-degree murder trial, a jury is to be instructed on a necessarily included lesser offense only if the greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and a rational view of the evidence at trial would support such an instruction. *Cornell, supra*, 466 Mich 357.

A rational view of the evidence presented in this case showed that premeditation and deliberation were in dispute. In many cases involving first-degree murder, the intent element is in dispute. The Supreme Court has reasoned that, more often than not, an instruction on second-degree murder will be proper. *Cornell, supra*, 466 Mich 358. Defendant angrily confronted the decedent about an item that had been in her possession. Defendant asked the decedent to "show [him] where [she] threw it." The prosecutor's theory was that defendant was referring to his cell phone, which the decedent had stolen from him after a sexual encounter. On the other hand, defendant's theory was that defendant was referring to a gun, which the decedent pulled on him in an effort to rob him. Defendant asserted that the gun flew out of the decedent's hand when he pushed her. The evidence was undisputed that defendant shot the decedent multiple times, fatally wounding her. However, there was disputed evidence regarding defendant's intent at the time of the shooting. Because premeditation was a disputed factual element in this case, the trial court acted well within its discretion when it gave jury instructions on second-degree murder. It is conceivable the jury could have found that, rather than killing the decedent according to a premeditated plan, defendant spontaneously killed her, warranting the second-degree murder instruction. *People v Fletcher,* 260 Mich App 531, 558; 679 NW2d 127 (2004). Therefore, a rational view of the evidence supported the second-degree murder instruction.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell